

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUSSELL MORGAN
Claimant

VS.

**UNITED EXCEL CORPORATION,
DEMOLITION CONTRACTORS, INC. and
DORE & ASSOCIATES CONTRACTING,
INC.**

Respondents

AND

**TRAVELERS INDEMNITY COMPANY
and BUILDERS ASSOCIATION SELF
INSURERS FUND**

Insurance Carriers

AND

**KANSAS WORKERS COMPENSATION
FUND**

Docket No. 1,022,473

ORDER

Insurance carrier Travelers Indemnity Company (Travelers) requests review of the July 28, 2005, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

The Administrative Law Judge (ALJ) awarded claimant temporary total disability compensation and medical treatment at the expense of “respondent and insurance carrier.”¹ The ALJ further found that respondent Demolition Contractors, Inc., (Demolition Contractors) and Travelers are estopped from denying coverage based on a Certificate of Liability Insurance provided by Travelers’ agent which specifically listed coverage for

¹ ALJ Order (July 26, 2005) at 1.

respondent Demolition Contractors by Travelers for the project at the job site at which claimant was injured.

There is no dispute concerning the compensability of claimant's injury. But Travelers claims the ALJ erred in finding that Travelers had insurance coverage for the injury suffered by claimant and in finding that Travelers should be estopped from denying coverage because of the Certificate of Liability Insurance issued by its agent. Respondent Demolition Contractors did not appeal the ALJ's Order.

Claimant argues that the Board should dismiss Travelers' application for review, claiming there is no jurisdiction for the appeal under K.S.A. 2004 Supp. 44-551(b)(2)(A) or K.S.A. 44-534a(a)(2). Claimant argues this appeal should be dismissed as frivolous and requests the matter be remanded to the ALJ for sanctions.

United Excel Corporation (United Excel) and its insurance carrier, Builders Association Self Insurers Fund (Builders), also argue that there is no jurisdiction for this appeal under K.S.A. 2004 Supp. 44-551(b)(2)(A) or K.S.A. 44-534a(a)(2). United Excel also claims that this is a frivolous appeal and, as such, the matter should be remanded to the ALJ for an award of reasonable expenses incurred by the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the stipulations of the parties, together with the briefs of the parties, the Board makes the following findings of fact and conclusions of law:

United Excel was in charge of a construction project at Bethany Medical Center. United Excel entered into a contract with Dore & Associates Contracting, Inc. (Dore & Associates) to do certain demolition aspects of the job. In turn, Dore & Associates contracted with Demolition Contractors to do the actual demolition work on the job site. Claimant was an employee of Demolition Contractors.

Travelers admits it had a policy of insurance which covered Demolition Contractors for workers compensation and employers liability. However, Travelers argues that its policy specifically states that the insurance coverage does not apply to any employee unless his or her employment was principally localized in Nebraska, and does not apply to any out-of-state employees who are hired to perform work in a state other than Nebraska. Immediately below that provision is an endorsement which states:

If you hire any employees outside Nebraska to begin operations in any other state other than Nebraska, you must obtain insurance coverage in that state and do

whatever else may be required under that state's law, as this endorsement does not satisfy the requirements of that state's workers compensation law.²

Travelers argued that since claimant was a Kansas resident hired in Kansas to perform work in Kansas, its policy does not apply to this injury.

Claimant argued that he has a compensable injury for which he is entitled to medical treatment. Claimant stated that Travelers' agent, Dunbar-Peterson Insurance Agency, provided a certificate of insurance that on its face showed that Demolition Contractors had coverage with Travelers which covered the Bethany Medical Center job. Claimant has been off work since May 29, 2005, and argues he is entitled to TTD and medical benefits.

Both claimant, United Excel and Builders argue in their briefs that there is no jurisdiction for this appeal under K.S.A. 2004 Supp. 44-551(b)(2)(A) or K.S.A. 44-534a(a)(2).

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review.³ The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.⁴ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁵

The issue of whether an insurance carrier can be estopped from denying coverage to a respondent and injured employee is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). And the ALJ did not exceed his jurisdiction in entering his order. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁶ Accordingly, Travelers' appeal is dismissed.

² Resp. Ex. A at 15.

³ See *Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968); *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 366 P.2d 270 (1961); *American States v. Hanover*, 14 Kan. App. 2d 492, 498, 794 P.2d 662 (1990).

⁴ K.S.A. 2004 Supp. 44-551.

⁵ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, Syl. ¶ 3, 994 P.2d 641 (1999).

⁶ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

Subject to the jurisdictional limitations of the Workers Compensation Act, Travelers may preserve the issue for final award.⁷ As provided by K.S.A. 44-534a(a)(2):

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

Finally, there is an issue about whether this appeal was frivolous and if so, whether sanctions would be appropriate. This issue was raised for the first time on appeal. K.S.A. 44-555c(a) provides that "review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." Accordingly, the question must be presented first to the ALJ.

WHEREFORE, it is the finding of the Board that Travelers' appeal is dismissed and Administrative Law Judge Steven J. Howard's Order dated July 26, 2005, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of November, 2005.

BOARD MEMBER

c: Leah Brown Burkhead, Attorney for Claimant
Theresa A. Otto, Attorney for Insurance Carrier Travelers Indemnity Company
Demolition Contractors, Inc., 2315 Madison St., Omaha, NE, 68107, Respondent
Wade A. Dorothy, Attorney for Respondent United Excel Corporation and Its
Insurance Carrier, Builders Association Self Insurers Fund
Dore & Associates Contracting, Inc., 900 Truman Pkwy, Bay City, MI, 48707,
Respondent
Ronald P. Wood, Attorney for Kansas Workers Compensation Fund
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁷ See *Bituminous Casualty Corporation v. American Fire & Casualty Co.*, 192 Kan. 233, 387 P.2d 159 (1963); *U.S.D. No. 501 v. American Home Life Ins. Co.*, 25 Kan. App. 2d 820, 971 P.2d 1210, *rev. denied* 267 Kan. 889 (1999); *Helms v. Tollie Freightways, Inc.*, 20 Kan. App. 2d 548, 889 P.2d 1151 (1995); *American States v. Hanover*, *supra* note 3.